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No. 87-1643

In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD SPANGLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly charged the jury on the subject of character evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 838 F.2d 85.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1988. A petition for rehearing was denied on February 19, 1988. The petition for a writ of certiorari was filed on April 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 14 counts of extortion and one count of conspiracy to commit extortion, in violation of 18 U.S.C. 1951 (C.A. App. 5, 7-35). He was sentenced to concurrent

terms of seven years' imprisonment on the extortion counts and to a five-year term of probation on the conspiracy count (C.A. App. 6). The court of appeals affirmed (Pet. App. 1a-7a).

1. a. The evidence at trial showed that petitioner, a lieutenant in the vice squad of the Philadelphia Police Department, was involved with two other vice squad officers, Andy Kelly and co-defendant Anthony Mairone, in a systematic pattern of extortion. During a period of several months in the early 1980's, Kelly and Mairone collected protection payments—generally between $5,000 and $6,000 per month—from several numbers writers and a sports betting operator. Mairone or Kelly would typically deliver the extorted money to petitioner, who would count it and divide it up among the three of them. Pet. App. 2a-3a; Gov't C.A. Br. 4-5.

b. Petitioner testified at trial and denied all the charges against him (see C.A. App. 682-684). He also called several witnesses who testified regarding his reputation in the community (Pet. App. 3a). Co-defendant Mairone also presented various character witnesses (*ibid.*). Both petitioner and Mairone asked the court to instruct the jury that "[e]vidence of good reputation in and of itself can create a reasonable doubt" (*ibid.*). The district court agreed to give a "character witness instruction," but it did not specify the particular form of the instruction (*ibid.*). Thereafter, counsel for Mairone told the jury during summation that "the reputation evidence in [and] of itself can create a reasonable doubt" (C.A. App. 750).

During the final charge to the jury, the court stated (Pet. App. 3a):

> Now, you did hear some, some people call it character evidence, reputation evidence.
>
> You heard a number of character witnesses, each of whom, some of whom, let's put it that way, I think, stated their personal opinion, as well as the reputation of the defendant in the community for honesty and being a law abiding citizen and the law says, you should consider such character evidence along with all the other evidence you heard in the case when making your determination as to whether the government has proved, beyond a reasonable doubt, that the defendant whose case you are then considering, committed the particular crime or crimes that are alleged in the indictment.

The jury subsequently convicted petitioner on all counts (C.A. App. 3).

2. The court of appeals affirmed (Pet. App. 1a-7a). The court held that the district court was not required to instruct the jury that evidence of good reputation, standing alone, is sufficient to create a reasonable doubt. Rather, the district court was simply required to apprise the jury, as it did here, of "its duty to take character evidence into account with all of the other evidence in deciding whether the government has proved its charge beyond a reasonable doubt * * *" (*id.* at 6a). The court also rejected petitioner's claim that the district court had breached a promise to give a "standing alone" instruction. The court found "no such promise in the record" (*ibid.*). In addition, the court noted that, to the extent that defense counsel believed that such an instruction would be given by the district court, petitioner was not harmed because "counsel was free to place greater emphasis on the significance of the character evidence than did the trial judge" (*ibid.*).

ARGUMENT

Petitioner contends that the district court erred in failing to instruct the jury that evidence of good reputation, standing alone, can create a reasonable doubt. That claim lacks merit and does not warrant further review.

1. The court of appeals correctly held that a "standing alone" instruction is not required. Petitioner can cite nothing in the Constitution or in any statute or rule that mandates such an instruction. Nor has this Court ever held that such an instruction is necessary.[1]

Furthermore, there is no policy reason for such an instruction. To the contrary, an instruction that singles out character evidence for special treatment is both misleading and confusing. As the Seventh Circuit has noted, "[t]he 'standing alone' instruction conveys to the jury the sense that even if it thinks the prosecution's case compelling, even if it thinks the defendant a liar, if it also concludes that he has a good reputation this may be the 'reasonable doubt' of which other instructions speak." *United States* v. *Burke*, 781 F.2d 1234, 1239 (1985). Such an instruction makes little sense, the court noted, since "[p]eople of impeccable reputation may commit crimes, and when they are charged with crime the question is whether they did it, not whether they enjoy a high social standing" (*ibid.*).

[1] This Court's decisions in *Edgington* v. *United States*, 164 U.S. 361 (1896), and *Michelson* v. *United States*, 335 U.S. 469 (1948), do not hold that a "standing alone" instruction is required in connection with character evidence. In *Edgington*, the Court simply refused to sanction instructions that treat character evidence as disfavored evidence. In *Michelson*, the issue was whether the prosecutor erred in introducing bad act evidence in response to defendant's character evidence. To be sure, the Court suggested in both cases that character evidence could itself create a reasonable doubt (see 164 U.S. at 366; 335 U.S. at 476), and there is dictum in *Michelson* that could be read to suggest that "in some circumstances" a "standing alone" instruction should be given (*ibid.*). Yet the issue of whether a "standing alone" instruction is required was not before the Court in either case, and neither case held that character evidence must be singled out for a special instruction. See *United States* v. *Burke*, 781 F.2d 1234, 1240-1241 (7th Cir. 1985) (explaining why *Edgington* and *Michelson* do not require a "standing alone" instruction).

Moreover, the argument that character evidence should be singled out for special attention is particularly weak in light of the fact that, as the court in *Burke* noted (*ibid.*), "[n]o instruction flags any other evidence for this analysis—not eyewitness evidence, not physical evidence, not even confessions."

In this case, the district court instructed the jury that the character evidence should be considered along with all the other evidence on the question whether the government proved the charges beyond a reasonable doubt (see Pet. App. 3a). That instruction was entirely proper, and petitioner was entitled to nothing more.

2. There is likewise no merit to petitioner's claim (Pet. 4-5) that review is necessary to resolve a conflict among the circuits. In general, it is now well established among the circuits that a trial court does not commit reversible error in refusing to give a "standing alone" instruction, particularly where, as here, the defendant testified on his own behalf or offered other evidence in addition to character evidence. See, *e.g.*, *United States* v. *Hunt*, 794 F.2d 1095, 1098, 1099 (5th Cir. 1986); *United States* v. *Marquardt*, 786 F.2d 771, 783 (7th Cir. 1986); *United States* v. *Borders*, 693 F.2d 1318, 1328-1330 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983); *United States* v. *Winter*, 663 F.2d 1120, 1146-1149 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Foley*, 598 F.2d 1323, 1336-1337 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *Carbo* v. *United States*, 314 F.2d 718, 746-747 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964); *Black* v. *United States*, 309 F.2d 331, 343-344 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963); *Poliafico* v. *United States*, 237 F.2d 97, 114 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957); cf. *United States* v. *McMurray*, 656 F.2d 540, 551 (10th Cir. 1980), rev'd on other grounds, 680 F.2d 695

(10th Cir. 1981) (indicating that a "standing alone" instruction is necessary where defense case is based solely on character evidence, but stating that such an instruction should *not* be given where the defendant presents other evidence to rebut the government's proof); *Smith* v. *United States*, 305 F.2d 197, 206 (9th Cir.) (indicating that a "standing alone" instruction is ordinarily not necessary), cert. denied, 371 U.S. 890 (1962); but cf. *United States* v. *Lewis*, 482 F.2d 632, 637 (D.C. Cir. 1973) (stating in dictum, in a case not raising the issue, that a defendant is entitled to a "standing alone" instruction). In fact, while some circuits permit such an instruction in the trial court's discretion, other circuits actually *prohibit* such an instruction. See *Burke*, 781 F.2d at 1241 & n.3 (collecting cases).

To be sure, the Second Circuit has indicated on two occasions that a "standing alone" instruction must be given, apparently without regard to whether the defendant presented evidence other than character evidence. See *United States* v. *Cramer*, 447 F.2d 210, 219 (1971), cert. denied, 404 U.S. 1024 (1972); *United States* v. *Minieri*, 303 F.2d 550, 554-555, cert. denied, 371 U.S. 847 (1962). In both of those cases, however, the failure to give the instruction did not constitute reversible error, in part because the trial courts had given instructions similar to those given in the present case. See 447 F.2d at 219; 303 F.2d at 555. Moreover, other Second Circuit cases have indicated that a "standing alone" instruction is *not* required. See *United States* v. *Fayette*, 388 F.2d 728, 737 (1968); *United States* v. *Lowenthal*, 224 F.2d 248, 249 (1955). We know of no Second Circuit case that has reversed a conviction because of a failure to give a "standing alone" instruction. In light of the trend in other circuits rejecting such an instruction, see *Burke*, 781 F.2d at 1241-1242 & n.3, it is far from clear that the Second Circuit would require a "standing alone" instruction if confronted with the issue

today, particularly where, as here, the defendant testified and denied the charges. See generally *Burke*, 781 F.2d at 1238, 1242 n.5; *McMurray*, 656 F.2d at 551. Since petitioner has not shown that, under the facts of this case, he would have been entitled to a "standing alone" instruction in any circuit, review by this Court is not necessary to resolve the purported inter-circuit conflict.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

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[2] Petitioner's factbound claim (Pet. 6-7) that he was misled as to the precise instruction that the trial court intended to give likewise does not merit further review. As the court of appeals noted (Pet. App. 6a), the district court did not mislead petitioner. Moreover, petitioner does not explain how his closing argument would have been any different had he known in advance the precise wording of the trial court's instruction. Thus, even if petitioner were correct that the trial court misled him, he has not shown that the outcome of the case was affected by the court's action (see *ibid.*).

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